STATE OF MICHIGAN

COURT OF APPEALS

SARAH ENGLAND,

Plaintiff-Appellee,

v

MEIJER, INC.,

Defendant-Appellant.

UNPUBLISHED
October 20, 2015

No. 322065
Wayne Circuit Court
LC No. 12-015002-NO

Before: BORRELLO, P.J., and JANSEN and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order granting in part and denying in part its motion for summary disposition in this premises liability and negligence action. The trial court denied defendant's motion for summary disposition on plaintiff's ordinary negligence claim despite granting the motion with regard to plaintiff's premises liability claim based on the same facts, finding that a hazardous condition on defendant's premises was open and obvious, but that a question of fact existed regarding whether defendant acted reasonably to remedy the hazardous condition after it had knowledge of the hazard's existence. On appeal, defendant argues that the trial court erred according to this Court's opinion in *Buhalis v Trinity Continuing Care Services*, 296 Mich App 685; 822 NW2d 254 (2012). For the reasons set forth in this opinion, we reverse and remand this matter to the trial court for entry of summary disposition in favor of defendant.

I. FACTS

This case arises from a slip and fall occurring at defendant's store on July 21, 2011. At about 8:45 p.m., an unidentified customer dropped a bottle of liquid laundry detergent in one of defendant's checkout aisles. The bottle broke open and a large amount of bright blue detergent spread about half the way across the white floor of the aisle, which was 1 of 10 aisles manned that evening by cashiers Angelica Jedro and Stacy Majtyka. Jedro noticed the spill immediately and turned off the aisle light in order to prevent foot traffic. Because Majtyka had gone on break, leaving Jedro as the sole cashier for 10 aisles, Jedro could not leave her area to obtain a wet floor sign. Although Jedro did not physically block off the aisle, she alerted her shift supervisor, JoAnne Smith, who called utility workers to clean up the spill. Shortly thereafter, Majtyka returned to the area and Jedro, noticing that the utility workers had not yet shown up, decided to grab a mop and bucket to clean up the spill herself.

At approximately 8:54 p.m., nine minutes after the spill, plaintiff and her husband were checking out after grocery shopping. As plaintiff was walking toward the front of the store, she entered the aisle where the spill was and slipped in the detergent. She fell sideways and collided with the aisle's conveyor system before hitting the ground. Plaintiff testified that she had not seen the liquid laundry detergent prior to the fall, and that her vision would not have been obstructed by anything other than her pregnant stomach.

On November 9, 2012, plaintiff filed a two-count complaint alleging premises liability and ordinary negligence on the part of defendant for the July 21, 2011 slip and fall incident. For premises liability, plaintiff claimed that defendant breached its duty to maintain a reasonably safe premises for invitees by "allowing the liquid laundry detergent, that caused [p]laintiff to slip and fall at its store, to remain on the floor where customers could slip on it, without cleaning it up, without warning customers of it, or without marking the area off with a warning or closing the area off." Plaintiff's ordinary negligence claim was couched in similar terms, alleging that defendant breached its duty to maintain its store in a safe condition and free from hazards by "allowing a dangerous condition to exist without cleaning it up, warning [p]laintiff of it or marking the area of the spilled laundry detergent off." Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10) on December 3, 2013, arguing that it was entitled to summary disposition on both counts because the liquid laundry detergent spill was an open and obvious condition on the premises with no special aspects, and defendant therefore had no duty to warn plaintiff about the spill or prevent her from encountering the alleged dangerous condition.

A hearing was held on defendant's motion wherein the trial court granted defendant's motion for summary disposition, in part, dismissing the premises liability claim before moving on to consider plaintiff's ordinary negligence claim. Defendant argued that plaintiff's claim for ordinary negligence was a premises liability claim by a different name, and that under *Buhalis*, "a plaintiff can't plead ordinary negligence to try to avoid the application of premises liability and the open and obvious doctrine." According to defendant, plaintiff's claim arose from a condition on the land and sounded only in premises liability. The trial judge initially took the issue under advisement, adjourning the hearing to allow plaintiff time to respond on the issue of whether it could bring an ordinary negligence claim based on the same set of facts as a premises liability claim, thus defeating the application of the open and obvious doctrine. The hearing on defendant's motion for summary disposition on the ordinary negligence claim resumed February 28, 2014 with defendant again relying on *Buhalis* to support its assertion that because the ordinary negligence claim arose out of an alleged hazardous condition on defendant's premises, it must be analyzed under the law of premises liability, and thus, was subjected to the open and obvious doctrine. In opposition, plaintiff relied on this Court's opinion in *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005), distinguishing a premises liability claim, which arises from a "duty as an owner, possessor, or occupier of land," from an ordinary negligence claim, which may be "based on the defendant's conduct." *Id.* Plaintiff argued that, under *Laier*, her ordinary negligence claim could survive despite the fact that it involved a hazardous condition because a lack of follow-through with the clean-up constituted conduct. The trial court agreed, denying defendant's motion for summary disposition on the negligence claim and stating:

> I do think that there was a duty here once the store began to clean up and they didn't finish, that those actions, that conduct brings to a question of fact did they do, did they do it in a way that was appropriate, and here I do not believe that that was the case . . . I do believe that that duty was created, that the, there's a question of fact of how it was breached and that by allowing the spill to stay there that long those were the, you know, actions of the Defendant. [H II, pp 24-25.]

Following denial of its motion for reconsideration, defendant filed an application for leave to appeal which was granted by this Court.

II. ANALYSIS

This Court reviews de novo a trial court's denial of a defendant's motion for summary disposition under MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). This Court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). Summary disposition is appropriate under MCR 2.116(C)(10) when there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). In negligence cases, determination of the existence of duty is a question of law subject to review de novo on appeal. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004).

"Michigan law distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land." *Buhalis*, 296 Mich App at 692. In any negligence action, a plaintiff must prove (1) that defendant owed plaintiff a duty, (2) that defendant breached that duty, (3) that the breach was the proximate cause of the plaintiff's injury, and (4) that the plaintiff suffered damages. *Taylor v Laban*, 241 Mich App 449, 452; 616 NW2d 229 (2000). In a premises liability action, "liability arises solely from the defendant's duty as an owner, possessor, or occupier of land." *Buhalis*, 296 Mich App at 692. An owner "owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). Absent special aspects such as unreasonable danger, this duty generally does not require the owner to protect an invitee from open and obvious dangers. *Hoffner v Lanctoe*, 492 Mich 450, 455; 821 NW2d 88 (2012). "An action in premises liability does not preclude a separate claim grounded on an independent theory of liability based on the defendant's conduct." *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005). However, "if the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence . . . even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury." *Buhalis*, 296 Mich App at 692.

As an initial matter, the fact that plaintiff has labeled her claim as an "ordinary negligence" claim does not bind the court to a negligence analysis. Courts are not bound by the

labels that parties attach to their claims, *Buhalis*, 296 Mich App at 691, and "[i]t is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim," *Adams v Adams*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007).

The plain words of plaintiff's complaint illustrate the true nature of her claim. She states that "[d]efendant had a duty to *maintain its store* in a safe condition and *free from hazards* so that customers, like the [p]laintiff, are not harmed by *unsafe conditions*," and "[d]efendant breached its duty by . . . not having one of [d]efendant's workers clean [the spill], warn people of it or mark the area off as a dangerous area." (Emphasis added.) Additionally, in her brief on appeal, plaintiff defined defendant's duty as the duty to "maintain the premises in a reasonably safe condition; to warn invitees of dangers they know of, should know of, or have created, unless the dangers are open and obvious; and to inspect the premises to discover possible dangerous conditions." Terms such as these clearly relate to the elements of a premises liability, rather than an ordinary negligence, claim. See *Wheeler v Central Mich Inns, Inc*, 292 Mich App 300, 304; 807 NW2d 909 (2011) (stating that terms such as "premises possessor" and "dangerous condition on the land" relate to elements of a premises liability claim and not an ordinary negligence claim).

Despite the fact that the written description of her claim clearly indicates an action in premises liability, plaintiff argues that her ordinary negligence claim differs from a premises liability claim in that it arises out of defendant's conduct in failing to clean up the known spill within a reasonable amount of time and according to its own policies. Inasmuch as plaintiff relies on defendant's written policies to create an independent duty, her argument lacks legal authority. Michigan courts will not impose a legal duty on a premises owner on the basis of its own written policies. *Buczkowski v McKay*, 441 Mich 96, 100-109; 490 NW2d 330 (1992). "Imposition of a legal duty on a retailer on the basis of its internal policies is actually contrary to public policy [because such a rule] would encourage retailers to abandon all policies enacted for the protection of others in an effort to avoid future liability." *Id*. at 109 n 1.

Plaintiff does not dispute the trial court's finding that the hazardous condition—a puddle of spilled laundry detergent—was open and obvious, but argues that defendant had a duty to clean up the spill within a reasonable time after it had actual notice of the spill. However, a landowner's notice of a hazard is irrelevant when the hazard is open and obvious, see *Lugo*, 464 Mich at 516, and the fact that defendant had notice of the hazardous condition does not, in itself, place any independent duty on defendant other than that of a premises owner.

Plaintiff relies heavily on *Laier*, 266 Mich App at 493, for the proposition that a premises liability action does not preclude an ordinary negligence action in the same case. Plaintiff is correct that a claim under a premises liability theory does not preclude a separate claim "grounded on an independent theory of liability based on the defendant's conduct." *Id*. But plaintiff's reliance on *Laier* is inappropriate in light of the facts presented here. In *Laier*, the decedent was crushed by a bucket of a front-end loader tractor while helping the defendant repair the tractor on the defendant's premises. *Id*. at 485-486. In that case, the plaintiff alleged a failure to use due care and caution on the part of the defendant while operating and controlling the tractor. *Id*. at 493. The defendant's operating and controlling of an instrument on the

premises, creating a separate duty to use ordinary care, is the type of overt conduct required to support a claim for ordinary negligence in addition to a premises liability claim.

The present case is distinguishable, as this case is based on a condition of defendant's land, and the facts do not illustrate any affirmative conduct on behalf of defendant or its employees that caused or contributed to plaintiff's injury. Nine minutes had passed between the time an unidentified customer of defendant's spilled liquid laundry detergent on the floor of one of defendant's checkout aisles and the time plaintiff slipped and fell in the detergent. At least one of defendant's employees had notice of the spill. While she turned off the aisle's light, she took no effort to block the aisle or place a caution sign in the area warning customers of the dangerous condition. The employee saw the spill, waited for her coworker to return, and then went to get a mop and bucket to clean it up, returning just after plaintiff had slipped on the puddle of detergent.

On these facts, we find that our decision in *Buhalis*, 296 Mich App at 685, is applicable, namely our holding that "[if] the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence." *Id.* In *Buhalis*, the plaintiff was injured when she slipped and fell over a patch of ice on the defendant's premises, and argued that the defendant's overt creation of the icy condition supported a claim for ordinary negligence in addition to premises liability. *Id*. at 692. This Court held that even the defendant's creation of the condition did not negate the fact that the icy patch was simply a "dangerous condition on [the defendant's] premises." *Id*.

"An action sounds only in premises liability when an injury develops because of a condition on the land, rather than from activity or conduct that created the condition." *Woodman v Kera, LLC*, 280 Mich App 125, 153; 760 NW2d 641 (2008), aff'd 483 Mich 999 (2009). Plaintiff attempts to argue that defendant's abandonment of the clean-up after its initiation was overt conduct that was required to meet a standard of reasonable care, but the facts do not support an assertion that defendant's employees ever undertook to clean up the spill in the first place. Defendant's employees did not begin to clean up the spill, which was an open and obvious condition on the premises, until after plaintiff had slipped. Plaintiff's argument is that defendant was negligent in simply *allowing the spill to exist*, a claim that is precluded by the open and obvious doctrine. However, this assertion further illustrates that plaintiff's remaining claim rests on a purported breach of the duty a defendant owes to its invitees "as an owner, possessor, or occupier of land." *Laier*, 266 Mich App at 493. Plaintiff cannot avoid the open and obvious danger doctrine by claiming ordinary negligence where the facts only support a premises liability claim. *Buhalis*, 296 Mich App at 692.

In this case, the trial court granted summary disposition in favor of defendant on plaintiff's premises liability claim, specifically finding that the bright blue laundry detergent spill was open and obvious as a matter of law, and that no "special aspects" existed to render the spill unreasonably dangerous under the circumstances. Thus, under the open and obvious doctrine, defendant had no duty to protect plaintiff from the dangers of the laundry detergent or prevent her from encountering such an obvious hazard. *Lugo*, 464 Mich at 517-518. Plaintiff does not dispute the trial court's finding that the condition was open and obvious. Without a legal duty owed by defendant to plaintiff, there can be no cause of action for premises liability or any other type of negligence. See *Taylor*, 270 Mich App at 440. Plaintiff's claim for ordinary negligence

is merely a claim in premises liability that she has renamed in an attempt to avoid the application of the open and obvious doctrine. The trial court erred when it denied defendant's motion for summary disposition on plaintiff's ordinary negligence claim despite its finding that the hazardous condition was open and obvious and, therefore, that defendant had no duty to warn plaintiff of it or protect her from encountering it.

Reversed and remanded. We do not retain jurisdiction. Defendant may tax costs. MCR 7.219(A).

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Donald S. Owens